
Vol. 9, No. 2/2019

Matrimonial Property Agreement – Importance and Role in Current Society

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Abstract: In recent years, more and more frequent, problems arise in the face of citizens in defending property rights, including in family relations. A civilized way of regulating the property relationships between spouses during or in the event of marriage is the matrimonial contract or the matrimonial property agreement, also known as a prenuptial contract. Although it is still viewed with scepticism, like many of the novelties that surprise today's society, the matrimonial property agreement is a legal act whose effects are still perceived with restraint by the majority of couples in Romania. Often considered a conditioning of love when one partner proposes to the other such a Convention, this institution makes a smooth, but safe way in the mentality of those who want to formalize their relationship, or even those they have been already united for many years of marriage. In order to be able to emphasize the importance of regulating this institution, a matrimonial property agreement approach is needed, taking into account the legal principles governing it, its legal character and the specific scope of the agreement.

Keywords: Matrimonial contract; family; marriage; matrimonial property regime; goods

1. The Place of the Matrimonial Property Agreement in the Matrimonial Property Regime

The matrimonial property regime is the synthesis of all the spouses' pecuniary rights and obligations, having their origin in the marriage institution, leaving outside their regulatory area other economic aspects of the property relationships that may arise between the spouses, such as: Maintenance obligations, liberalities, succession rights.

The rules specific to any matrimonial property regime shall specify the manner in which such property is disposed of and managed. This is mainly about knowing whether each of the spouses can manage their assets themselves, or whether their

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rights of disposition and administration are concentrated solely in the hands of one of the spouses, or they are divided between the spouses.

The economic and social factor makes an important contribution to the regulation of the basic regime, to which all married couples must be subject, which may differ depending on the country's local traditions and the concepts of marriage, but may change, adapt and evolve, as it happened with the new Civil code returning to the regulation of matrimonial property regimes, something that we have insistently asked for by doctrine and daily realities, which have been substantially modified by the market economy, to which the previous regulation of the Family code was obsolete.

Thus, there may be situations in which future spouses have substantial property, with professions whose pecuniary side they contribute to and during marriage, and they may opt for a regime of separation of property, thereby undesirable confusion.

In addition, one of the spouses can pursue professions with a high pecuniary risk, which can cause damage to their common assets, and therefore the spouses, by mutual agreement, can consider the choice of the separatist regime to be the best solution for the fairness of the couple's coexistence.

The option for a matrimonial property regime is not mandatory, under the new regulation, spouses can be subject to the legal regime, based on a set of rules, applicable to all those who wish to conclude a marriage, and there is no total freedom to negotiate, because we do not have to deal with a contract.

In most systems of law there is a choice between several matrimonial property regimes. As a rule, the law provides for a legal matrimonial property regime, which applies whenever future spouses have not chosen another conventional regime, as well as one or more matrimonial property regimes, of which they may establish one by matrimonial property agreement, to govern matrimonial relations within their marriage.

Under Romanian law, starting with the fact that matrimonial property regimes form the heart of a marriage property right, regulating the pecuniary relationships between spouses inherent in the conclusion of any marriage and keeping in mind all the novelty changes implemented by the New civil code, in matters, the legal community regime remains the main point of reference for spouses in the organization of their property relationships, if they do not intend to make changes to it by means of a matrimonial agreement and make it a conventional regime.

Separatist regimes are the pure expression of the spouses' freedom of will, which, by means of the matrimonial agreement, wish to make relations between themselves fit in an individualistic way, protecting their own heritage, but maintaining a minimum of cohesion specific to family relations, in order to contribute to the common aim in relation to their own resources.

The matrimonial property agreement, governed by Article 329-338 Civil Code, is the legal act by which future spouses establish their own matrimonial property regime, or, where applicable, by which the spouses alter their matrimonial property regime. In principle, the matrimonial agreement is concluded by the future spouses, that is, before the marriage and produces legal effects only from the date on which the marriage is concluded, but it can also be concluded during the marriage, taking effect from the date set by the parties or, in absence, from the date of the conclusion.

2. The Principles Governing the Matrimonial Property Agreement

Being a contract, any matrimonial agreement will be governed by the principles applicable to any legal act, which is why we will focus only on those rules specific to a matrimonial contract (Vasilescu, 2003).

A particular aspect of the matrimonial property contract institution is *the principle of freedom to conclude matrimonial property agreements*. This means that anyone who wants to marry, as well as married, have the right to enter into a marriage contract, regardless of sex, race, nationality, ethnic origin, language, religion, opinion, political affiliation, property and social origin.

Under this principle spouses can choose the matrimonial property regime that suits them or combine different matrimonial property regimes with each other, and adopt a foreign matrimonial property regime, which is not provided for by the law of the State of which they are nationals. The freedom of matrimonial property agreements is broader than in ordinary law, as is known by its own restrictions, which are foreign to other contracts.

Above all, it should be noted that the freedom of matrimonial property agreement does not derive solely from the autonomy of the parties, but also from the specific nature of family-related regulations. In a system of flexible law, it is a natural consequence of this malleability that future spouses should be able to choose the applicable matrimonial property regime by concluding a matrimonial property agreement combining any property rule. On the other hand, certain legal acts only

have specific features if they are covered by a matrimonial property agreement. This is the case for donations, which may record features which derogate from the common law applicable to them.

Secondly, the specific freedom of matrimonial property agreement is reflected in the terms of contracting and capacity to exercise. Being closely United by the marriage, the matrimonial property agreement is guided by the rule of ability according to which the person can enter into a valid marriage can also commit a valid marriage contract.

This rule requires that, as a matter of principle, certain requirements for the conclusion of the marriage and the conclusion of the matrimonial property agreement are respected. This means that, for example, for minors, if they are given the possibility of marriage on their own, without legal assistance or authorization, they will also conclude the marriage contract themselves and personally. Symmetrically, if certain authorizations are requested by the minor to marry, the same approvals will be required for the conclusion of the matrimonial property agreement. For the grown-ups, the rule does not have a specific one, implying the mere idea that whoever may marry may also conclude the legal act governing his property relationships during marriage.

As for the content of the freedom of matrimonial property agreements, apart from the form, which is strict, the matrimonial property agreement being a formal act, the parties can in principle decide how they want the subject matter of the contract. Any regulated matrimonial property regime may be established, the arrangements provided for by the law may be combined alternatively, or a special regime may be created, through the combination of original rules and provisions. However, spouses cannot, with all their freedom, be allowed to contravene public policy and good morals, to derogate from the prohibitive provisions of the law and, lastly, to change the legal order of succession.

For example, it is not conceivable that future spouses would stipulate clauses denying the principle of equality of rights between men and women, establishing conventional incapacities for one of their spouses. Just as one of the spouses cannot relieve *ex nunc* of his parental powers, nor can the succession order be changed or the rules of succession devolution generally be altered.

The limits specific to a matrimonial property agreement are also laid down by *the principle of marriage accessories*. Matrimonial property regimes have only the purpose of regulating the property relationships between spouses. This means that

the effects and the legal cause of a matrimonial property agreement are closely linked to marriage.

We are dealing with a special legal case in the sense that the property relationships, which are formed in the effects of the agreement, are subordinate to family support, and this is an issue that animates those who conclude a matrimonial property agreement. Any misappropriation of the rule shall entail the nullity of the matrimonial property agreement. In addition, the specific effects of the agreement only concern the creation of a specific matrimonial property regime applicable between spouses. The Parties shall ensure that the parties to the matrimonial property agreement are given access to the information referred to in Article 2(1). They will occur only during the marriage, while the parties to the matrimonial property agreement are married (Vasilescu, 2003).

It is therefore not conceivable that the effects of the matrimonial property agreement should start before the marriage, nor can they occur after the marriage has ceased or is terminated. Therefore, when the marriage is dissolved or terminated, the problems also arise in relation to the termination of the effects of the matrimonial property agreement. However, depending on the specific nature of the matrimonial property agreement, the conventional matrimonial property regime may also involve its liquidation, with the legal determination of the property and obligations, which were previously covered by the matrimonial property regime. If the termination of the effects of the matrimonial property agreement is linked to the termination of the marriage state, liquidation may be a specific matter, only attached to the concrete type of applied matrimonial property regime.

As I mentioned, the connection between marriage and the marriage agreement is very close, so that the ability to contract – its content and forms of exteriorization – is influenced by the marriage institution. This does not mean, however, that the two legal categories are studied jointly. Each of them has its own regime, apart from natural conditionalities, which in all cases are unequivocal: Marriage influences the matrimonial agreement and not the other way round.

Thus, for example, marriage's vices of consent are not directly reflected, under the same name and legal regime, in the matter of the matrimonial property agreement, but in the recon. If the marriage is annulled the effects of the matrimonial property agreement will not occur either, but not because the matrimonial property agreement will also be considered null for the vexation of consent, but only because its reason has disappeared. In the latter case, we will have to deal with the obsolescence of the

matrimonial property agreement rather than the nullifiability of the property act. If the matrimonial property agreement has been concluded and the marriage is no longer celebrated, the matrimonial property agreement will have no effect. If the matrimonial property agreement is affected by misconsent, it will only lead to the cancellation of the contract, leaving the marriage unaffected. And in the case of the spouses they will be considered to have never entered into any matrimonial property agreement, as they are married under the legal matrimonial property regime (Vasilescu, 2012).

The importance of knowing the principles governing the matrimonial contract is indisputable. They apply to all matrimonial property agreements, without the possibility of derogation, as they are mandatory rules.

3. The Legal Character of the Matrimonial Property Agreement

Regarded as an expression of the intention of future spouses to establish their own matrimonial property regime or to alter the existing one, the matrimonial property agreement is a bilateral legal act by definition, obviously between the spouses, property regimes and also successive enforcement.

However, a matrimonial property agreement is more than a mere act of the genesis of a mere concrete legal report, it is a pattern with the vocation to determine the parameters of the property life of the spouses. The synallagmatic and onerous nature of the matrimonial property agreement is, for instance, to be accepted in the sense that each of the spouses is bound by it, as well as in the idea of marrying the effects of their act, and not as an asset to generate mutual and interdependent obligations, a legal link in which the obligation of each party has legal cause in the obligation of the other.

Moreover, the act in question is rather incompatible with the term or condition as modalities of the legal act.

Thus, we note as specific legal characteristics, capable of creating the characteristics of the matrimonial property agreement, the following:

- *Personal character*, imprinted by *intuitu personae* of the act of marriage, meaning that the Convention is concluded and the person's consideration; In view of its specific nature, it is possible, unlike marriage, to conclude not only personally by future spouses but also by authorized representative of special and genuine authority with predetermined content (Article 330 (1) (c));

- *Special causal act*, in that it is animated by a specific legal cause, namely to be in the service of marriage;
- *Complex nature* as a genuine property charter of relations between spouses and relations between them and third parties;
- *Solemn character*, under the sanction of absolute nullity, shall end with the authentic instrument;
- *Public character*, in the case of effects to third parties, the matrimonial property regime shall be entered in the national register of matrimonial property regimes (Article 334 paragraph 1 Civil Code).

4. The Object of the Matrimonial Property Agreement

The matrimonial property agreement, *lato sensu* being a contract, in defining its subject matter, it is possible to depart from the general provisions on the subject-matter of the contract, namely Article 1225 paragraph (1) Civil Code according to which ‘*the subject-matter of the contract is the legal transaction, such as sale, rental, loan and other similar, agreed upon by the parties, as reflected in all contractual rights and obligations*’.

It should also be noted that “*the subject matter is a substantive, essential, valid and general condition of the civil legal act*”. According to the same Article, the subject-matter of the contract must be determined and licit, under the sanction of absolute nullity, if it is unlawful if it is prohibited by law or is contrary to public policy or to accepted morality.

With regard to the subject-matter of the matrimonial property agreement, we have special provisions which, although they are not derogations from the ordinary law, nevertheless restrict its scope. According to Article 332 article (1), Civil Code, “*the matrimonial property agreement may derogate, under the sanction of absolute nullity, from the legal provisions relating to the matrimonial property regime chosen only in the specific cases provided for by law*”, paragraph 2 of the same Article adding that “*the matrimonial property agreement may also not affect the equality between the spouses, the parental authority or the devolutions of legal succession*”.

In the above-mentioned texts, the Romanian legislator does not mention the subject matter of the matrimonial property agreement, but merely lists the matters which cannot be covered by the agreement. As Article 1225 paragraph (1) Civil code the object of a civil legal act must be a legal operation, the provisions of Article 329 Civil Code specify the subject matter of the matrimonial property agreement, i.e. the

“choice of a matrimonial property regime other than that of the legal community”. Consequently, *the operation of choice of the matrimonial property regime of the conventional community or the separation of property, within the limits imposed by law, is an object of the matrimonial property agreement* (Vasilescu, 2012).

Two observations on the extent of the matrimonial property agreement need to be made with regard to the subject-matter of the matrimonial property agreement. Thus, firstly, the choice of matrimonial property regime other than that of the community of property may affect the legal provisions governing the matrimonial property regime chosen only in the specific cases provided for by law.

Secondly, the legislator, in paragraph 2 of Article 332 of the Civil Code, has expressly stated three aspects on which the future spouses cannot make any changes, namely the equality between them, the parental authority and the devolution of their legal succession.

Consequently, the subject-matter of the matrimonial property agreement is the choice of the matrimonial property regime applicable to the property relationships between the spouses. Irrespective of the method of expression chosen by the legislator, the object of the matrimonial property agreement is the choice of matrimonial property regime from those permitted by law, where the spouses do not wish that their relations should be governed by the legal matrimonial property regime, and future spouses have both the option of choosing, and to change the matrimonial property regime chosen, within the limits imposed by each individual legislature.

After the choice of the conventional community regime, the chosen regime shall be modelled, the parties having no legal community regime as a template, but may not depart by specific provisions from the Community legal regime, except in the particulars described in Article 367 Civil code, as regards both the subject matter and the content of those provisions. In this context, we note that, as far as the subject of the clauses derogating from the common community law regime is concerned, article 367 Civil code allows deviations regarding the constitution of the common asset and liability, the extension of the co-management rule, as well as regarding the liquidation of the conventional community, including by including in the matrimonial convention the precipitous clause.

4. The Importance and Role of the Matrimonial Property Agreement

The importance of the matrimonial property agreement lies primarily in the fact that its conclusion enables the spouses to eliminate possible differences that may arise in the event of a divorce by determining the matrimonial property regime applicable to their marriage.

The need for a matrimonial contract arises from the need to give the spouses the possibility of determining themselves the matrimonial property regime applicable to their marriage, if they do not agree with a legal provision that they may replace or amend it, by means of a matrimonial agreement concluded with due regard for the wishes of both spouses, of course, and in compliance with the mandatory legal rules.

If the mandatory legal rules relating to the matrimonial property regime of the spouses agree to them within the limits of goods of common use and consumption, then these rules are not acceptable to the spouses as regards the ownership of buildings, production equipment and other considerable property rights, which the spouses can obtain during their marriage. For example: today, the conclusion of a matrimonial contract is primarily of interest to the entrepreneur, who wants to preserve all his rights to the firm in the event of a divorce.

The purpose of the matrimonial property agreement is to provide spouses with fairly extensive possibilities in determining the matrimonial property regime applicable to their marriage, so that they can derogate from the provisions applicable to the legal matrimonial property regime, which starts to apply automatically from the moment the marriage is entered into.

Apart from what may seem to be a petty matter, the matrimonial contract has at least the advantage that it manages the money and the time of future spouses. In the event of a matrimonial contract, divorce becomes an easy formality, as all matters relating to this matter can be stipulated in the matrimonial contract and the assets of the two spouses are to be distributed according to the couple's wishes.

From a legal point of view, the matrimonial contract can be as explicit and long as necessary and cover as many aspects as the two parties wish. One of the most common types of matrimonial property contracts concerns family property. When one of the spouses is involved in a family business, he will most of the time want - like the other family members engaged in the activities of the business - to keep it on the same "blood" criteria. Likewise, if one of the spouses accumulates substantial

debts before marriage, it is more than likely that the other side will be able to protect its property from the creditors of the debtor spouse.

Thus, since most disputes arise on the way in which the matrimonial property is shared, the matrimonial contract can be used to provide certainty that the couple's wealth will be properly shared, that it will be transferred from one spouse to another, or that the rights over it will be shared equally by the spouses or by quotas - parties. All these provisions and solutions to situations that may arise can be established in an organized and well thought-out manner in what Americans call "*the prenuptial*" (prenuptial contract)

At present, the best regulated pre-natal contract is in America. In order to be valid, the prenuptial contract must be signed by both spouses, who must have both contractual capacity and participate in the arrangement on their own. The parties shall be obliged, before the conclusion of the contract, to declare honestly all their financial obligations and properties affected by the burdens. However, if one of the spouses had or could have had information about their financial or property debts, the prenuptial contract remains valid even if the other party hid or forgot to specify the duties to which it is assigned.

5. Instead of Conclusions

As mentioned above, whenever the spouses do not have their own matrimonial property agreement concluded prior to the marriage, or although they have concluded such an agreement, it is null or void, the property relationships between the spouses are subject to the legal community of property, in this way, the parties' choice of legal regime is presumed.

Under these circumstances, how would such an assumption be made in the case of future spouses who have concluded a matrimonial agreement, but their agreement being null or void, they fall under another regime, that of the legal community? Can we substitute the unequivocal will expressed (in the matrimonial agreement) with a presumed will?

In practice, their freedom of will is limited to choosing the matrimonial property regime of those who initially opted for a matrimonial property agreement, but for various reasons they are then covered by the ordinary law regime, and there is no possibility of any other option.

One explanation is, of course, that any explicit choice has in principle the default option for the regime established by the law, but we believe that, despite the new provisions on the matrimonial property agreement, the rules in this area should be reviewed, so that the principle of freedom of will is genuinely respected when choosing the matrimonial property regime applicable to spouses.

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